IN SENATE OF THE UNITED STATES.

JANUARY 12, 1848.

Submitted, and ordered to be printed.

Mr. WESTCOTT made the following

REPORT:

The Committee on the Judiciary, to whom was referred the petition of the heirs of Abner L. Duncan, report:

This case was before this committee at the two last sessions of Congress; and, at the last session, a report was made as follows:

IN SENATE OF THE UNITED STATES.—February 25, 1847.

Mr. WESTCOTT made the following report:

The Committee on the Judiciary, to whom was referred the memorial of the heirs of Abner L. Duncan, &c., report:

That it appears this case was before the Senate in 1830, and a report (see Rep. No. 20, 1st sess. 21st Cong.) made by the Judiciary Committee upon it adverse to the prayer of the then memorialist, who, it appears from that report, (the only document giving any evidence on that point before the present committee,) was "John Nicholson, acting executor of Abner L. Duncan," who, by this evidence it seems, left a last will and testament. The papers before the Senate in 1830, it appears, (see Senate Journal, 1st sess. 21st Cong., p. 29,) were withdrawn by the petitioner. The present memorial is not accompanied by any evidence, except by a document purporting to be "extracts" from the record, &c., of an action of trespass instituted by Abner L. Duncan against John H. Elton, in the supreme court of the State of Pennsylvania for the eastern district, which document is certified as authentic, &c. The following is the material part of it:

"ABNER L. DUNCAN *vs.* JOHN H. ELTON. } Summons: Trespass *vi et armis*, &c., upon the high seas; *exit* 27th July, 1819. Same day, Narr. filed. 'Summoned' 6th October, [illegible] for commission to New Orleans *ex parte* plaintiff, and

interrogatories filed. Same day, rule on the part of the plaintiff for commission to Savannah, Georgia; interrogatories filed. Defendant's attorney consents that the commissions may issue *ex parte*, 13th October. Commissions to New Orleans and Savannah issued, by writing filed 20th June, 1820. Defendant pleads not guilty, and justification and issues, 2d November, 1820. Rule by plaintiff's attorney for special jury 19th January, 1822. Rule by plaintiff for a commission to New Orleans, and interrogatories filed. Duplicate commissions to Savannah and New Orleans issued 3d October, 1822. At nisi prius, 18th November, 1822, defendant's death suggested. Duplicate commission to Savannah returned and opened 8th April, 1823. Commission to New Orleans returned and opened 6th May, 1823. 8th January, 1824, Anthony Elton, administrator of John H. Elton, substituted as defendant. 4th May, 1824, the death of Abner L. Duncan is suggested, and Phillip Hicky, George Matthews, John Nicholson, and J. N. Duncan, executors of his last will and testament, are substituted as plaintiffs; 7th December, 1824, defendant pleads additionally no assets and *plene administravit*.

"Afterwards, to wit: at nisi prius, 8th December, 1825, before Judge Gibson, a jury being called, came, to wit: Robert Swan, Charles Allen, Michael Reed, John Goodwin, Charles Graff, William Hughes, Robert Evans, John Rush, William Ryer, Joseph Pickey, Samuel Hutchinson, and Hugh Harbeson, who being duly empannelled, returned, tried, chosen, sworn, and affirmed according to law, upon their oaths and affirmations, respectively, do say that they find for the defendant, subject to the opinion of the court. 2d January, 1826, judgment for the defendant. 2d January, 1826, judgment."

None of the pleadings in the suit appear in this document. Copies of certain documents are given, from which it may perhaps be safely inferred that this suit was for the seizure of the vessel and cargo of Mr. Duncan and Mr. Duplessis in 1817, by Captain Elton. It, however, is not understood by the committee how the suit was continued after the death of Mr. Duncan and Captain Elton, and in the names of their representatives, as by the common law it would have abated upon the death of either; nor does it appear whether the verdict and judgment were on the *merits of the case*. If they were, the petitioners have no pretence for a claim on the United States; for their only ground is, that the United States should pay what, if Elton had lived, could have been recovered of him, and which his death prevented them from recovering.

The petition in this case does not state the names of "the heirs of Abner L. Duncan," and purports to be signed by the "attorney in fact for heirs of A. L. Duncan, deceased." It does not set forth the facts of the case on which the claim is founded, but it is chiefly to combat the reasoning of the report of the committee of the Senate in 1830. The only evidence before the committee of those facts, as formerly presented to the Senate, is the report then made.

The committee will not say that they coincide in the principles and argument of that report upon the case as therein presented; it is not, in their judgment, necessary or proper, as the case now stands.

They are of opinion that no action should be had in the case upon the petition and papers now filed. The original papers presented in 1830 should be produced, or their absence accounted for. If it is a case for relief, the proper parties entitled to it should apply for it. The "*legal representatives*," executors, or administrators of Duncan & Duplessis, jointly, not "*the heirs*" of one of the *part owners*, (who left a will,) should *prima facie* be those for whom lawful relief should be extended, if any is justly claimed by any parties. If there is any reason for a different course, it should be shown.

The committee, therefore ask to be discharged from the further consideration of the petition.

—

Documents, called "additional evidence," are now presented.

1. The 13th volume of Sergeant and Rawles' Reports of the decisions of the supreme court of the State of Pennsylvania, containing, at page 415, the opinion of the court by *C. J. Tilghman*, in the case tried in that court. By the extract from the "*record*" above mentioned, it appears the verdict was for "*defendant*, subject to the opinion of the court." By the printed "*report*" it seems the verdict was "for the *plaintiff*, subject to the opinion of the court," which is erroneous; the record of, or the report, is not shown, but probably the *report*, and this is also the legal conclusion. The case, as recited in the "opinion," shows it is doubtless the same case. It was, it appears, decided ultimately in favor of the defendants, upon the ground, as the marginal note of the decision; and the "opinion" also shows, that *an action of trespass, vi et armis, for forcibly seizing a vessel and cargo on the high seas, abates by the death of the defendant before judgment.*" This report proves the correctness of the reasoning of the committee at last session, as to the trial in Pennsylvania; but it does not by any means remove the difficulties existing with respect to the allowance of this claim. It is true, if evidence, it tends to show that the *verdict* was not upon the "*merits of the case;*" although, from the naked extract from the "record" above recited, the contrary seemed probable. This, however, if conceded, removes but one bar to the payment of this claim.

2. A certified copy of an entry in the records of the Supreme Court of the United States is also presented. It is in these words:

SUPREME COURT OF THE UNITED STATES,
February Term, 1819.
No. 68.

The SCHOONER IRIS, PETER L. B. DUPLISSIS, CLAIMANT, *vs.* THE UNITED STATES.	Appeal from the circuit court for the district of Georgia.

This cause came on to be heard on the transcript of the record,

and was argued by counsel; on consideration whereof, it is decreed and ordered, that the decree of the circuit court for the district of Georgia in this case be, and the same is hereby, reversed and annulled; and, this court proceeding to pass such decree as the said court should have passed, it is further decreed and ordered that the property be restored to the claimant.

I, William Thomas Carroll, clerk of the Supreme Court of the United States, do hereby certify that the above is truly extracted from the minutes of said Supreme Court, of February term, A. D. 1819.

In testimony whereof, I hereunto subscribe my name, and affix the [L. S.] seal of said Supreme Court, at the city of Washington, this thirtieth day of October, 1847.

WM. THOS. CARROLL,
Clerk of the Supreme Court United States.

It is alleged that all the papers filed in this case in the Supreme Court of the United States are missing; and the committee are informed, that they never came into the possession of the present clerk of that court, being missing when he took the office. Still, it is to be presumed, the claimants could, by proper diligence, procure copies of the same papers from the office of the clerk of the district court of the United States, or of the clerk of the circuit court of the United States for Georgia, where the case was originally tried; and such testimony is indispensably necessary to a just and proper decision upon this claim by Congress. The plaintiff in the trespass suit in the supreme court of Pennsylvania, it is to be supposed, had an exemplified copy of the record in the Supreme Court of the United States, (now lost,) and probably used it as evidence on that trial; and the present claimants, it is to be presumed, with reasonable diligence, could obtain it.

The committee do not find, in the "additional evidence" now adduced, sufficient cause for changing the report made last session. The claim *may* be founded in justice, but it would be making an unsafe precedent to sanction it on the meagre proofs now adduced. The *fact* whether *probable cause* existed for the seizure of the Iris and cargo, by captain Elton, may be a very pertinent inquiry. Though the Supreme Court of the United States did not either declare there was probable cause, or award any damages against captain Elton, as it had the power, if the pleadings allowed its exercise, for seizing the vessel, &c., without probable cause; yet, the absence of such decree does not establish the fact as to the character of the seizure either way. The *bona fides* of the claimant in the transactions that caused the seizure may also be a material subject for investigation. The production of a full record of the case, as presented to the Supreme Court, and of the testimony filed before it, and in the Georgia courts; and the production of the documents showing the proceedings subsequent to the final decision of the Supreme Court of the United States; and also the production of the papers before the Senate in 1830, when this claim was then preferred, which papers were "*withdrawn*" by the claimants, would

not only elucidate those questions, but are also necessary for another reason. It seems, by the certificate of Mr. Carroll, now adduced, (above quoted,) that the property was decreed, by the decision of the Supreme Court of the United States, to be "*restored to the claimant.*" If it be conceded that the claim for indemnity is just, surely it is essential to ascertain the amount of the real damages sustained; and if the vessel and cargo, or the proceeds of their sale, were received by the claimants under that decree, the United States should be credited what was so paid.

The committee deem it important that the suggestions made in the two last paragraphs of the report, presented at the last session, should not be disregarded. Caution should be exercised with respect to the recognition of claimants, as being the proper *parties* entitled to relief; and they should be required to present their cases in a proper manner, and supported by proper documentary proofs; and, in every instance, the best evidence the nature of the case admits of should be demanded. By such course only can the *merits* of claims be fully and certainly ascertained, and imposition upon the government prevented.

The committee, therefore, ask to be discharged from the further consideration of the petition.